Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Usage of the Public Switched Network by Information Service and Internet Access Providers	)))	CC Docket No. 96-263

COMMENTS OF THE INTERNET USER COALITION

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TABLE OF CONTENTS

The Internet Users Coalition represents the interests of citizens who depend on the Internet for civic and social discourse, a potentially limitless source of information and entertainment, a powerful tool for education and research, and an efficient platform for economic activities. Its seven goals to maximize Internet growth are as follows:

- **Digital Bandwidth for Internet Citizenship**
- **Open, Decentralized Architecture**
- **Universal Accessibility to an Interconnected, Global Network of Networks**
- **Affordable Prices**
- **Consumer Choice**
- **Non-discriminatory, Use-neutral Pricing**
- **Community Involvement**

The IUC's comments stress this fundamental point:

> ***In supervising how the nation's telecommunications infrastructure should accommodate the Internet, the FCC must adapt its policy and legal analysis beyond traditional telephony principles. Its actions must also advance the First Amendment goals of promoting the free flow of information and creation of a well-informed electorate.***

The IUC believes that this standard compels the Commission to reject proposals to impose new charges on citizens seeking Internet access *via* the nation's switched telephone networks.

The Internet resembles no other medium. It seamlessly facilitates both speech and commerce, so that the expansion of each of them assists the expansion of the other. In fashioning its policies, the FCC must recognize and accommodate this extraordinary attribute of the Internet. Its supervision of the nation's switched telephony infrastructure must now also address First Amendment concerns it previously confronted only in regulation of mass media. Internet users are not just "ratepayers." They are also ***citizens*** using these services for political speech, access to information, lifelong learning, communications, and commerce.

New access charges will impede the necessary development of more efficient, high-bandwidth, open architecture data networks for the digital age. Access charges would deliver the wrong economic incentives to telcos ("ILECs"), rewarding them for expanding their use of the existing structure rather than adopting more efficient digital technologies.

Moreover, use-sensitive access charges will diminish the Internet's use and stifle its growth. They would also contradict the goals of the 1996 Telecommunications Act, especially with respect to the goal of bringing advanced networks to the nation's schools and libraries.

Nor are such charges needed. The ILECs have used flawed assumptions to support their claims that such fees are necessary to protect the functionality of the nation's telephone network. Internet usage is ***not*** causing excessive or unmanageable congestion in the telephone network; and the ILECs have offered only unrepresentative samples and anecdotal evidence in an attempt to show it has. Such charges would also injure competition, since they would enable the ILECs' own Internet Service Providers ("ISP") subsidiaries to achieve decisive pricing advantages.

The nation's telephone companies are fully compensated for Internet usage under the current regulatory structure. Their anecdotal studies seeking to justify new Internet access fees decidedly overestimate the costs attributable to Internet traffic. Nowhere do they compare these alleged new costs with their ordinary cost structures. Moreover, their own data show that most Internet traffic is carried at off-peak hours, and thus does not require addition of new capacity. Perhaps most significantly, these studies also ignore the ILEC's additional revenue streams generated by second lines and per-call fees currently paid by Internet users. The ILEC's revenue from second line sales alone was placed at $1.4 billion for 1995.

Access charges are a solution in search of a problem. The FCC should reject them.

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COMMENTS OF THE INTERNET USER COALITION

The Internet User Coalition ("IUC") and its member organizations,[1] respectfully submit the following comments in response to the Commission's *Notice of Inquiry* ("*NOI*"), FCC No. 96-488 (released December 24 1966). The IUC appears on behalf of citizens who depend on the Internet for civic and social discourse, and seek to realization of its potential as a limitless source of information and entertainment, a powerful tool for education and research, and a platform for previously unattainable economic efficiencies.

The IUC has been formed to advocate federal policies which expand American citizens' Internet access. The Internet is a new and hitherto unimaginably widespread communications medium, the development of which can improve the quality of both speech and commerce.

The IUC's premise is that, in assessing how the nation's telecommunications infrastructure should accommodate the Internet, the FCC must adapt its policy and legal analysis beyond traditional telephony principles. In particular, it must ensure that its actions also advance the First Amendment goal of promoting the free flow of information and creation of a well-informed electorate. Application of this paradigm should compel the Commission to reject proposals to impose

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[1]The IUC is still in formation. On the date of this filing, its member organizations are: Media Access Project, Center for Democracy and Technology, Association for Educational Communications and Technology, The Benton Foundation, Consortium for School Networking, Consumer Federation of America, Consumers Union, League of United Latin American Citizens, National Association of Secondary School Principals, National Association of State Boards of Education, Voters Telecommunications Watch, and Writers Guild of America East.

new charges on citizens seeking Internet access *via* the nation's switched telephone networks.

New "access charges" will impede the development of more efficient, high-bandwidth, open architecture data networks for the digital age. Those telephone companies claiming that such fees are needed to protect the functionality of the nation's telephone network use flawed arguments and unsupportable factual premises:

- Internet usage is *not* causing excessive or unmanageable congestion in the telephone network.
- Additional charges for Internet access would send the *wrong* incentives and will, if anything, delay construction of data-friendly networks.
- The nation's telephone companies are fully compensated for Internet usage under the current structure.
- Anecdotal studies seeking to justify new Internet access fees misperceive the nature of the Internet traffic and ignore the additional revenue streams the Internet generates through second lines and other fees.

A FRAMEWORK FOR CONVERGENCE: HOW THE FCC CAN INTEGRATE ITS POLICIES ON THE INTERNET, FREE SPEECH AND ECONOMIC FREEDOM

For more than sixty years, the FCC has separately regulated telecommunications carriers providing mass media or "common carrier" services. The long-awaited convergence of these functions is now well under way, in large part because of the sudden and unexpectedly explosive growth of the Internet.

The Internet resembles no other medium. It seamlessly facilitates both speech and commerce, so that the expansion of each of them assists the expansion of the other. In fashioning its policies, the FCC must recognize and accommodate this extraordinary attribute of the Internet. For the first time, its supervision of the nation's switched telephony infrastructure must also

address First Amendment concerns it has not previously confronted only in its regulation of mass media.

As it recognizes in mass media jurisprudence, the Commission should treat Internet users not just as "ratepayers," but also as *citizens* using these services for political speech, access to information, lifelong learning, communications, and commerce.

Because the issue of Internet access charges arises in the context of the Commission's revision of the nation's telephony infrastructure, its resolution necessarily implicates the existing framework of traditional common carrier regulation. These policies have focused less on the uses made with the network than on the network itself. They have emphasized the realization of reasonable carrier profits and efficacy of the public switched telephone network ("PSTN"), while assuring "just and reasonable" rates to consumers.

While the need to integrate mass media elements into its decision is less immediately obvious, it is no less important. The Internet and other information services have layered new, higher-order technologies on top of the existing local exchange carrier loop, private data backbones, and transmission protocols. These new technologies have begun to enrich the ***marketplace of ideas*** in the process. Technological convergence will recast what had heretofore been common carrier and private transmission services into new forms of media for political, civic, artistic, and commercial speech.

New forms of mass communication require new First Amendment applications, but the underlying goals remain the same. The Supreme Court has repeatedly ratified the First Amendment ideal that government should ensure the "widest possible dissemination of informa-

tion from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). It has held that "the people as a whole retain their interest in free speech...and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 389 (1969).

The task, then, is to apply 18th-century constitutional principles to 21st century technologies. Professor Cass Sunstein has described the dilemma the Commission now faces in this way:

> Sometimes constitutional doctrine seems to have lost sight of the point of central constitutional commitments. Sometimes the commitment to free speech seems like an abstraction insufficiently...connected with democratic goals, or indeed with any clearly describable set of governing aspirations.

Cass Sunstein, *Words, Conduct, Caste*, 60 U. Chi. L. Rev. 795, 797 (1993).

Professor Sunstein's response is that government must infuse its actions with policies which create an environment for democratic discourse. Building upon the writings of Alexander Meiklejohn, he emphasizes that "[o]ur constitutional system is one of deliberative democracy," and that government's role is to stimulate and nurture democracy. Government cannot ***restrict*** speech, but it can, and should, ***promote*** "attention to public issues,...[and]...diversity of view...." Sunstein, *The First Amendment in Cyberspace*, 105 Yale L.J. 1757, 1762 (1995). He concludes that

> A well-functioning democracy requires a degree of citizen participation, which requires a degree of information; and large disparities in political (as opposed to economic) equality are damaging to democratic aspirations.

Id., at 1762-63 [footnotes omitted].

The IUC asks the Commission to follow this model. It should regard the creation of an environment for free expression and civic discourse, as well as electronic commerce, as a central

object of its decisionmaking, not an afterthought.

The most important characteristic of the Internet may be that it brings freedom to the citizens using it - freedom from technological, regulatory, and geographic boundaries. The Commission's goal in framing Internet policies should be to ensure that every American can receive affordable access to the Internet, and that competition for provision of Internet service flourishes.

The Commission's *NOI* confronts some of the important issues of the decade. It will use comments filed here to review, *inter alia:* (1) how its rules can most effectively create incentives for the deployment of facilities that enable efficient transport of data traffic: and (2) what effects the current system of regulation[2] may have on the PSTN, ILEC cost recovery, and the development of the information services marketplace. *NOI* at ¶¶313, 315. As it evaluates the record in this proceeding, the Commission must not lose sight of the fundamental principle that its policies should maximize citizens' freedom to use the Internet.

I. THE INTERNET USER COALITION: A STATEMENT OF GOALS.

The Internet User Coalition ("IUC") is comprised of organizations and individuals that depend on the Internet for civic and social discourse, as a potentially limitless source of information and entertainment, as a powerful tool for education and research, and as an efficient platform for economic activities. These parties believe that the open, decentralized, and

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[2]The Commission's current system of regulation classifies Internet service providers ("ISPs") as "enhanced services." It considers such enhanced service providers to be end users, buying many lines for the purposes of processing user traffic and transferring it to a private data network. It does not impose the per-minute access charges for terminating traffic on incumbent local exchange carrier ("ILEC") networks. *NOPR* at ¶284-85.

interactive nature of this medium makes it a unique and invaluable way to broaden access to political and cultural speech. The ability to access and share a wide array of data, text, and multimedia files gives the Internet a utility for education, research, and collaboration-at-a-distance that cannot be rivaled. Moreover, the Internet offers a potentially efficient means of marketing and distribution which will reduce frictional, transactional, and marketing costs, inuring to the benefit of economic participants on a global scale. To help realize this potential, and to expand citizen access, members of the coalition have endorsed seven underlying goals:

1. **Digital Bandwidth for Internet Citizenship.** The most significant bottleneck preventing individuals and small organizations from taking full advantage of the Internet today is inadequate bandwidth from the end-user to the ISP.[3] The Internet will reach its full potential only when digital bandwidth at affordable prices is generally available. Therefore, the Commission's policies should encourage the development of a variety of high-bandwidth, digital access services for the home and small organizations.

2. **Open, Decentralized Architecture.** The Internet is becoming an important means to promote the free flow of information precisely because of its decentralized architecture and open standards. This allows all users to access the information network regardless of what type of computer, modem, or software they use. The Internet's decentralized nature provides users with the utmost freedom of speech, which permits them a wide variety of expressive activity in a wide variety of ways. Therefore, citizens must have multiple, competitive access options which are free from gatekeepers.

3. **Universal Accessibility to an Interconnected, Global Network of Networks.** The Internet will only reach its full potential when every citizen who wants to connect has the ability to do so. The same reasons to encourage that every American be connected to the public switched ***telephone*** network apply with equal force to interactive ***data*** networks. The Commission should adopt policies with an eye toward encouraging broad access, and preventing discrimination in

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[3]For example, in its "Bandwidth Forum" on January 23, 1997, the Commission received voluminous testimony and data on this subject. Although they may have differed on solutions, virtually all witnesses agreed that inadequate bandwidth was a serious problem.

deployment of interactive technologies.

4. **Affordable Prices.** Full participation on the Internet depends on affordable pricing. Indeed, pricing is closely related to, and a critical underlying element of, the goal of universal accessibility. Flat rate pricing plans, which result in fixed charges to the end-user, have been most effective at meeting user needs and encouraging greater usage. Changing the pricing of the end-user's "last mile" connection is unjustified; it has not been shown to be fairly allocable to actual net costs incurred, and may inhibit the deployment of data-friendly, higher-bandwidth services. Regulators will have a critical role to play in ensuring that basic telecommunications services enable affordable access, especially during the transition from monopoly to a competitive local telecommunications marketplace.

5. **Consumer Choice.** Competition will best provide a wide range of service options and prices. With competitive markets, including both "last mile" local transport services and information services, users will be able to select those services best tailored to their needs and budgets.

6. **Non-discriminatory, Use-neutral Pricing.** One of the unique features of the Internet is the degree of freedom it offers its users to apply the data they receive to whatever purpose they wish. At the present time, this includes publishing, sending, and receiving multimedia documents which can reach a worldwide audience with text, audio and even video messages. These uses are rapidly evolving, and new uses are being developed constantly, but the transmission medium remains the same whatever the use. It is this flexibility that allows the Internet to continue to offer its users innovative and efficient ways of accomplishing basic communications tasks which used to be more difficult and expensive. Therefore, users ought not to be subject to regulation or to price differentiation based on the ultimate use of the data they receive or transmit.

7. **Community Involvement.** All users of the Internet benefit when there is maximum participation from community institutions such as schools, libraries, and other local organizations. These organizations play a unique role in disseminating interactive media to future generations and to individuals who may not otherwise be able to access them. Therefore, Internet policies must be implemented in a way which promotes community involvement.

II. THE DEVELOPMENT OF HIGH BANDWIDTH, OPEN ARCHITECTURE DATA NETWORKS IS OF PARAMOUNT IMPORTANCE TO INTERNET USERS, BUT IMPOSING NEW CHARGES ON ISPs OR INTERNET USERS WILL NOT HELP TO PROMOTE THIS GOAL.

The Commission has asked several questions about how its rules can "most effectively create incentives for the deployment of services and facilities to allow more efficient transport of data traffic...." *NOI* at ¶313. Noting that ILECs have raised concerns about congestion in the PSTN, it asks whether there are technical solutions to these concerns, such as hardware routing data traffic around switches, new high bandwidth technologies such as ADSL, or wireless solutions. *Id.* Finally, it observes that the end-to-end dedicated channels created by the circuit switched PSTN are "unnecessary and even inefficient" for carrying packet-switched data traffic. *Id.*

While a myriad of complex and technical issues surround these questions, they are of paramount importance to Internet users. The transition to high bandwidth, data-friendly transport technologies is perhaps the most important challenge to the future accessibility and functional development of the Internet. Many of the technologies which could provide this greater bandwidth will, by their very nature, alleviate congestion on the PSTN.

The IUC believes that the best strategy to encourage this transition is the hands-off approach, together with aggresive efforts to promote competitive access to the local loop. It is dangerous to pick a particular technology or industry as a favorite in this race. Moreover, it is unnecessary; marketplace forces are already in line to ensure a higher bandwidth future. What the Commission must do is ensure that these competitive forces have the ability to operate. ILEC proposals to impose access charges on ISPs, however, would diminish these forces by giving

ILECs incentives to continue to use the PSTN for ISP traffic.

A. Data Transport Technologies Must Be Competitively Provided And Must Allow For High Bandwidth And Open Architecture.

The eventual migration of Internet traffic from the PSTN to more efficient data networks will benefit Internet users and PSTN users alike. From the standpoint of the Internet user, it is crucial that emerging technologies allow for: adequate bandwidth to allow easy, fast retrieval and transmission of information; competitive provision of local data transport; fair competition among ISPs; and transport provision free of bottlenecks.

It is also crucial that new technologies preserve the Internet's open, decentralized architecture. The open nature of the Internet's standards and protocols, which permits user access regardless of what equipment is used, is an essential factor in its development.[4]

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[4]Daniel J. Weitzner, one of the undersigned counsel to this document, testified at length about the importance of the open architecture of the Internet's delivery system at the Commission's Bandwidth Forum.

> The strength of the Internet derives from both affordable access and a uniquely open architecture. Traditional communications media such as radio and television have been affordable and readily available around the country, but have failed to enable full democratic [discourse] because of architectural limitations. For example, online discussions of political issues enable users to exchange views, and even pose questions to political figures, in a way that broadcast television can never support. The Internet's architecture allows for a diversity of views and exchange of information which are simply impossible in any other communications medium.
>
> The Internet manifests five critical attributes in its basic architecture that give it such potential to enhance democratic discourse: Decentralized, gatekeeper-free access; Bi-directional, interactive capability; Multiple, competitive access points; Open standards; and Affordable service.
>
> In considering policies to promote broader access to advanced communications infrastructure, we hope that the Commission will take these characteristics as baseline policy goals.

Such technologies are in fact being developed. Comments being filed in this docket on behalf of the Internet Access Coalition and America Online will include a more detailed discussion of the technologies that are in development or currently available for carrying data traffic. These will include technologies that make more efficient use of existing wireline facilities and those that provide for facilities-based competition. The IUC, therefore, will not discuss each of these in detail. It will similarly leave it for other parties to discuss when these new transport platforms could be deployed, which of them would best suit ISP needs, and what regulatory relief would best provide an incentive for the deployment of these technologies.

B. Imposition Of New Fees Would Not Place The Proper Economic Incentives On The Proper Parties To Promote The Evolution Of More Efficient Data Networks.

Some ILECs have argued that it is necessary to impose access charges on Internet use because it is the only way to give ISPs the proper incentives to migrate from their current use of the PSTN to more data-friendly technology. According to this argument, one "consequence of today's pricing signal is to retard the adaptation of more appropriate technologies." Bell Atlantic Study at 6. *See also*, Letter from James Young, Vice President and General Counsel,

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> The democratic potential of the Internet will only be realized with broad access to the Net for both individuals and community organizations. The Commission can help bring that potential of the Internet to the broad cross-section of the population by encouraging the development of new access options that promote these essential attributes of the Internet architecture.

Daniel J. Weitzner, Deputy Director, Center for Democracy and Technology, "Expanding Access To the National Information Infrastructure For Individuals and Community Organizations: Open Architecture and Affordable, Digital Bandwidth," presentation at Federal Communications Commission Bandwidth Forum, January 23, 1997.

Bell Atlantic, to Senator John McCain (February 28, 1997)("current policies provide little incentive for Internet providers to embrace...new technologies").

In fact, the very opposite may be true. The ILECs' argument misapplies the economic principle that it is desirable to place the costs of an activity on the party which is best able to control those costs. Actually, the best way to encourage innovation in the management of data traffic is to place the costs on ***ILECs themselves***. They are, after all, the parties best able to control costs in the PSTN. A surefire way to ***discourage*** innovation is to let ILECs pass costs along to parties who are in no position to manage deployment of network resources. If ILECs can collect compensation for voice network access to ISPs, they will have a strong incentive to build more voice network facilities. There will be little incentive for them to invest in newer, data friendly networks.

The notion that new charges are necessary to motivate ISPs to improve their facilities is based on an inaccurate portrayal of the Internet industry, because it ignores the preferences of Internet users. It assumes that, much the same as the local telephony market, the information services market is not competitive. This misconception leads the ILECs to conclude that ISPs will fail to act unless there are regulatory incentives. But this is not the case; the ISP market is presently highly competitive. There is every indication that users who want more data-friendly networks and/or less congestion will demand it, and will vote with their feet. Indeed, CompuServe and Erol's quickly moved to capitalize on reports of congestion faced by America Online customers by advertising that they offer fewer busy signals. Therefore, an ISP already has a powerful, direct economic incentive to adopt more efficient service.

Moreover, the rapid development of technology, and recent growth in the number of Internet users, ensures that ISPs will not become entrenched with their existing systems. The ILECs' physical plant is designed to be in service for many years, and its modular nature allows additional equipment to be added to work alongside existing equipment. It would not make sense, therefore, for a typical ILEC to discard its investment in existing architecture. In contrast, computing technologies evolve constantly and at lightening speed, so ISPs will not face the same inertia. Moreover, Internet communications operate because they use a common protocol, and do not require all users to be operating the same equipment. An ISP can receive data easily on a 14.4 kbps modem, an ISDN modem, or an ADSL network, side-by-side ***without interference***. Bell Atlantic's own study documents how ISPs have already embraced technological improvements. It finds that ISPs in its area have installed the more efficient primary rate interface ISDN ("PRI ISDN") on about 50% of their lines. Bell Atlantic Study at 6. Other experts have noted that they are eager to adopt newer transport methods. Jeff Caruso, "ISPs Drive ADSL Ahead," *CommunicationsWeek*, March 17, 1997.

C. Build It, And We Will Pay.

When - and only when - digital, data-friendly networks are available, users will be willing to pay a reasonable, cost based price. The ongoing, enormous user demand for improved computer modems demonstrates this. In just a few years, the industry standard has gone from 2400 baud to 28.8 kbps, and now to 56 kbps. At the same time, the price for these high-speed modems has greatly declined to reflect costs. There is every reason to believe that similar consumer demand exists for data-friendly networks.

Users should not be made to pay until these data-friendly networks are available from ILECs, at cost based prices. As just noted, there is no guarantee that revenues generated from data transmission will ever be devoted to development of networks, or anything besides ILEC general funds.

III. THE CURRENT REGULATORY SYSTEM PROMOTES BENEFICIAL USES OF THE INTERNET, CAUSES AN EQUITABLE REGULATORY OUTCOME, AND POSES NEITHER A THREAT TO THE PSTN NOR A NET COST TO ILECS.

The Commission asks several questions concerning the "effects of the current system on network usage, incumbent ILEC cost recovery, and the development of the information services marketplace." *NOI* at ¶315. It asks commenters to provide data on the characteristics of information service usage and its effects on the network, including the "incumbent ILEC's costs directly related to ESP's use of the PSTN,...revenues attributable to ESP traffic (including second phone line revenue), and...a comparison of what PSTN services ESPs desire, as opposed to what they currently have access to." *Id.*

These questions are important, but their focus is far too narrow. In asking how to allocate costs between the industries, the *NOI* fails to explore adequately the needs of the citizens who use the Internet. The IUC urges the Commission to pay greater attention to the needs of Internet users - both institutional users and citizens. Given that the new fees proposed by the ILECs will be borne by these users, the Commission cannot overlook them.

A. The Commission Must Consider The Effects Of Changes In The Current System Of Regulation On The Users Of The Internet.

The *NOI* contains many questions about the effects of the information services industry: about congestion that ISP traffic may cause on the PSTN, ILEC costs and revenues, and the ISPs'

current and hoped-for use of the PSTN. *NOI* at ¶315. Nowhere, however, does it promise to consider what the effects might be on the parties most directly affected by the outcome of these issues -- the Internet's users.

As several members of the IUC have already observed, MAP, *et al. NOPR* Comments at 1-3, information services are more than another product; they are an evolving medium of speech that has assumed an important and growing role in the social, economic, and political life of the citizens using it. Imposing new fees will affect far more than the information services market. It is no exaggeration to state that it would impact the very nature of the modern democratic process - the freedom and ability of citizens to speak.

In making policy judgments on imposition of fees on Internet users, the Commission must treat the Internet as an arena of citizen speech and political discourse. The Internet is unique in that it offers all speakers a level playing field - it is the "most participatory form of speech that this country - and indeed the world - has yet seen." *ACLU v Reno*, 929 F.Supp. 824, 881 (E.D. Pa. 1996), *probable jurisdiction noted,* ___ U.S. ___ (December 9, 1996). The Internet is also an ever-expanding and boundless source of information and entertainment. "Citizens from all nations are finding additional outlets for personal and political expression, utilizing interactive fora...to voice their opinion and to listen to the views of others." Information Infrastructure Task Force, "A Framework for Global Electronic Commerce," (Draft #9, December 11, 1996) at 1. Finally, at the very same time it has the potential to enhance speech and personal freedom, it offers greatly improved efficiency of commerce, transcending distance and borders. "[T]he Internet has blossomed into an appliance of everyday life, a medium accessible form almost every

point on the planet, brimming with an inestimable range of data and information. In essence, the Internet has become the vehicle of a new, global digital economy which has enveloped the physical world, altering traditional concepts of economic, political, and social relations." *Id.*

1. Imposition Of Access Charges On ISPs Would Diminish Internet Use.

The current system of regulation, under which ISPs do not pay access charges, has been highly effective in promoting speech, retrieval of information, and commerce over the Internet. The affordable, flat rate pricing and open architecture it promotes has fostered a competitive, creative, and dynamic market for ISP services.

Applying access charges to ISPs could destroy this. ISPs facing new, per-minute access charges will have two alternatives: they can either absorb the new costs, or pass them through to users in the form of higher prices. Absorption of these costs will be difficult, since high levels of competition have already driven prices down to the point where profit margins are very thin. *See, e.g.*, Wayne Rash, Jr., "Expensive Access Lessons Loom for Internet Users," *CommunicationsWeek*, January 13, 1997. The result is likely to be a widespread industry fallout, which in turn would lead to less competition, little innovation, and insufficient consumer choice. The IUC believes that, therefore, ISPs are far more likely to pass these new costs along to users.

The parties best able to absorb these costs are the ISPs owned and operated by the ILECs themselves. Backed by its parent's immense capital resources, an ILEC's ISP business unit will have an unfair advantage over unaffiliated or entrepreneurial competitors. If it wished, an ILEC's ISP unit could keep its rates low by not passing along the access fee to its subscribers, withstanding any resulting losses for a longer period than its unaffiliated competitors. For the ILEC, the

access charge payment is in the nature of an internal transfer, so that while the profits of the its ISP unit would be reduced if it did not pass along the increase, the net result would be a wash. Doing this, the ILEC's ISP would presumably draw market share from non-ILEC ISPs. The reduction in volume and profits could force many of these unaffiliated, entrepreneurial ISPs out of business. In the alternative, an ISP unit of an ILEC could raise prices anyway, enjoying larger profits per customer than competing ISPs. It could still afford to raise prices less than the full amount of the access charge, so as to still unfairly increase its market share.

Non-ILEC ISPs are more likely to raise prices so as to pass their new costs through to citizens; this could also be looked upon as a private tax on Internet use. As with any tax placed on an activity, the incidence of the activity will decrease. Indeed, high per-minute charges are the number one reason for lower Internet use in foreign countries, according to a recently-reported study by the Organization for Economic Cooperation and Development. Douglas Lavin, "High Access Costs For Net Depress Usage, Study Says," *Wall Street Journal*, March 14, 1997, at B3C. Moreover, new users may be discouraged from trying the Internet, which will have a disproportionately great impact on a medium which is still very much in development. Finally, this tax will diminish the uniquely egalitarian nature of online speech - lower income users, who may be most sensitive to fluctuations in price, could be foreclosed entirely. The economic cost of this tax, moreover, will be borne not only by the individuals whose speech would be silenced, but by all Americans, who would be deprived of the benefits of a widely used speech and commercial forum.

2. Imposing Fees Based On The Uses Made With Data Received Will Destroy The Flexibility Of Internet Activity.

The Commission seeks comment on the effects of new applications for Internet-delivered data, such as "Internet telephony, [and] real-time streaming audio and video services..." *NOI* at ¶316 (footnote added). It asks how these new services should affect its analysis. *Id.*

In short, they should not. The Commission should decline to follow requests to regulate the Internet based on uses made of the data communicated over the network.[5] No matter what software application they are running, Internet users transmit and receive the same thing over the network every time and all the time: packets of data. The Commission could not determine which citizens were using which applications at any given moment, no more than it could determine the subject of particular voice conversations being carried out on the PSTN.

Moreover, to devise a system of charges based on present day uses would be problematic. As noted above, the uses of those data packets are constantly and rapidly evolving. It would be nearly impossible to predict with certainty which specific uses might ultimately become stable and prevalent, especially within the time frame of agency rulemaking proceedings. Attempting to determine the uses made with every packet may well be a violation of user privacy, perhaps conflicting with the Electronic Information Privacy Act. 18 USC §§2510, *et seq*. And it would be unwise, because it would reduce the flexible, open nature of speech and activity which has

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[5]For example, the Commission has received a petition from the America's Carriers Telecommunications Association observing that some Internet users have begun to use the information networks for real-time two-way conversations, and seeking regulatory protection. Petition for Declaratory Ruling, Special Relief, and Institution of a Rulemaking, RM-8775 (filed March 4, 1996)("ACTA Petition"). The Commission plans to address the issues raised in that petition in a separate proceeding. *NOI* at n. 438.

driven the development of this medium. Indeed, the complexity added by a regulatory process of approval and classification of new uses may well stifle innovative forces. This could destroy the freedom from regulatory burdens which has enabled introduction of groundbreaking developments in such fields as democratic speech, multimedia presentations, educational applications, and telemedicine.

3. Imposing Fees On Users Will Conflict With The 1996 Telecommunications Act Goal Of Promoting Access For Schools And Libraries.

In the Telecommunications Act of 1996, Congress directed the Commission to adopt broad reforms to ensure that educational institutions and libraries had access to advanced telecommunications services. 1996 Act, §254(h). To that end, the Federal-State Joint Board on Universal Service has recommended a 20-90% discount for all telecommunications services, Internet access, and internal connections. *Recommendations of the Federal-State Joint Board on Universal Service*, at ¶440. Its recommendations of general discounts on all telecommunications services, and discounted Internet access, were designed to further Congress' goal of "schools and libraries [having] access to the wealth of information available on the Internet, and, therefore,...to advanced telecommunications and information services...." *Id.* at ¶465.

Imposing access charges on ISPs would work at cross-purposes with these initiatives. Just like all other Internet users, schools and libraries would face increased costs to connect to their ISP, and would have to reduce their amount of use drastically. Thus, the Commission would be taking with one hand what it had given with another. The result would be a diminution of the enormous potential of the Internet as a tool for learning. It could altogether deprive those students who do not have home computers with Internet connections of any opportunity to use

this medium.

B. Imposing Access Charges On ISPs Would Cause Regulatory Inequities.

In addition to potentially stifling the growth of speech and commerce which the Internet has experienced to date, imposition of access charges at this time would be unfair as a matter of regulatory policy. It would reverse a wise policy judgment, which has promoted the growth of ISPs, alarm monitoring, and many other services, and it would do so at a time when the reasons for the previous policy have gotten even stronger. Yet, given the uncertainty surrounding whether Internet traffic causes a net cost to ILECs, pages 22-34 below, reversing this policy would provide few, if any, benefits. Moreover, it would allow a degree of market segmentation which is so unprecedented in common carrier regulation that it would depart from the very core of common carrier principles.

1. The Same Logic Which Led The Commission Twice To Decline To Impose Access Charges To Enhanced Service Providers Applies To ISPs Today.

In comments to the *NOPR*, and other public statements, many parties have argued that it is time to discontinue the exemption for "enhanced service providers," because it was a temporary policy designed for an infant industry which has grown up. America's Carriers Telecommunication Association, for example, states that the enhanced services industry "is no more or less an 'infant' industry and is no more or less mired in a state of change and uncertainty than is the local/long distance [calling] industry." ACTA *NOPR* Comments at 26. Pacific Telesis asserts that "the Enhanced Services industry is now well developed." PacTel *NOPR* Comments at 76. *See also*, Dorman Speech at 6.